72-1032

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1032

NORBERT K. LACHMANN,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner Norbert K. Lachmann respectfully prays that a writ of certiorari issue to the review judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 29, 1972.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit is reproduced in Appendix A hereto (p. 20). Although not yet officially reported, the opinion of the Court of Appeals is unofficially reported by Com-

merce Clearing House, Inc. at 72-2 U.S.T.C. Par. 9766, and by Prentice-Hall at 31 A.F.T.R. 2d Par. 73-314.

Jurisdiction

The judgment of the Court of Appeals was entered on November 29, 1972, and is reproduced in Appendix B hereto (p. 27). On December 19, 1972, Hon. William J. Brennan, Jr., signed an order "that the time for filing a petition for Writ of Certiorari" in this case (No. A-655) be extended to include January 19, 1973; and on January 12, Hon. William J. Brennan, Jr., entered an order that such time be further extended to include January 28, 1973. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Is there an irreconcilable conflict between the First and Third Circuits over the meaning of "wilfulness" in 26 U.S.C. Sec. 7203?

2. Does the opinion below, declaring a "settled" rule which excludes a method for objecting to jury instructions, conflict with the opinions of other Circuit Courts and with the literal requirements and spirit of the Federal Rules of Criminal Procedure?

Statutes and Rules Involved

26 U.S.C. Section 7203 — Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return

(other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000. or imprisonment for not more than 1 year, or both, together with the costs of prosecution.

FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

RULE 2 — PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

RULE 30 — INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict,

stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Statement of the Case

Norbert K. Lachmann [hereinafter sometimes "petitioner"] was charged in an information filed by the United States Attorney for Rhode Island with violating Section 7203, Internal Revenue Code of 1954, by "wilfully" failing to file timely federal income tax returns for 1964, 1965, 1966, and 1967, on or before April 15 of the years following. (R. 1, 3-5)

Before trial petitioner's counsel filed a MEMORANDUM OF LAW (R. 6-20) with the District Court conceding that the petitioner "had a legal obligation to file such returns and that he failed to file them at the time required by law." (R. 6) This MEMORANDUM OF LAW[1] focused attention on the issue of the petitioner's "wilfulness", referring to a split among the Courts of Appeal as to the meaning of "wilfulness" in Section 7203.

Among other points, this MEMORANDUM OF LAW referred to cases under Section 7203 requiring proof by the Government of a taxpayer's "bad purpose" or "evil motive" in failing to file a timely return, and specifying such "bad purpose" to be "so the government would not know the

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[1] This pre-trial MEMORANDUM OF LAW, or brief, was originally submitted because counsel for the petitioner, the United States, and the District Court, had agreed to waive a jury trial (R. 12); it was designed to inform the Court of petitioner's position. Subsequently, the Court withdrew its approval of the no-jury arrangement (Rule 23(a), Rules of Criminal Procedure) and the case was tried to a jury. (R. 222) The District Court, however, did suggest to petitioner's counsel that he might wish to incorporate this brief as part of petitioner's argument in support of his motion for a new trial. (R. 221)

extent of his [the taxpayer's] liability". Cf. *United States* v. *Litman,* 246 F.2d 206, 209 (C.A. 3, 1957); *United States* v. *Vitiello,* 363 F.2d 240 (C.A. 3, 1966); *United States* v. *Hartman,* 409 F.2d 198 (C.A. 3, 1969). Under such cases "laxity", or "carelessness", or even "gross negligence" of a non-filing taxpayer was held insufficient to make out the offense under Section 7203.

This MEMORANDUM OF LAW referred, however, to cases in other Courts of Appeal that seem to eliminate any requirement of proof of "bad purpose" or "evil motive" in the crime defined by Section 7203. *United States* v. *Fahey,* 411 F.2d 1213 (C.A. 9, 1969); *United States* v. *Matosky,* 421 F.2d 410 (C.A. 7, 1970).

In view of this disagreement among the Courts of Appeal, petitioner's pre-trial MEMORANDUM OF LAW attacked Section 7203 as unconstitutionally vague — if the District Court here accepted the diluted interpretation of "wilfulness", viz. the interpretation that eliminated the Government's obligation to prove "bad purpose" or "evil motive" in a Section 7203 prosecution.

The Government's entire case consisted of brief testimony from two witnesses, hereinafter separately summarized, and exhibits.

Revenue Agent Julio Rodio

The first witness for the Government was a revenue agent, Julio Rodio. (R. 52, 53)

Rodio testified that in September of 1968 (some five months after the due date for the last income tax return involved in this case) he developed "an airplane project". In September of 1968 Rodio obtained from the Rhode Island State Aeronautics Division the name of airplane owners in Rhode Island. (R. 54, 55) He then sought from the Internal Revenue Service Center income tax returns

of those so listed. (R. 54, 55) Since the petitioner's name was among these listed, Rodio sought from the Service Center income tax returns of the petitioner for 1964, 1965, 1966 and 1967. (R. 66, 67)

As a result of the response he received, Rodio on March 3, 1969 wrote to petitioner requesting information about returns filed and/or not filed by him. (R. 67-70; Ex. 15) Rodio received no response to this letter. (R. 68)

On March 14, 1969, Rodio wrote a second letter to the petitioner, similar to the first (form letter 210). (R. 67-69) Rodio was subsequently notified by Attorney Lester H. Salter that he, and his firm (Salter and McGowan), were acting for Lachmann under a power of attorney. (R. 68, 69)

Lincoln S. Noble

The second — and last — witness called by the Government was Lincoln S. Noble. (R. 72-73) The prosecutor's questions to Noble sought to elicit an "admission", allegedly or supposedly made by the petitioner to Noble concerning the petitioner's non-filing of income tax returns. (R. 96-103)

Noble testified that the only explanation given to him by the petitioner for failing to file the income tax returns in question was "I just didn't get around to it or something to that effect". (R. 102, 103)

The Government's Exhibits

Stipulated as evidence, with their contents then read to the jury by the prosecuting attorney, were income tax returns filed by the petitioner in 1969 (after Revenue Agent Rodio had received from Attorney Lester H. Salter notice that Salter was representing Lachmann) covering

the years 1964, 1965, 1966, and 1967. (R. 48-50, 104-106, 229, 233, 237, 241; Exs. 1, 2, 3, 4)

The returns for these four years reflected income from two sources: (1) Salary from the City of Cranston, on which income tax had been withheld, and (2) Income from "The Huebscher Trust" (most of this trust income was dividend income) administered by the Fifth Third Union Trust Company of Cincinnati, Ohio. (R. 228-244) In addition to these two sources, the only other income reported on such returns was $12.85 of bank interest in 1964. (R. 230, 266)

It was stipulated that the returns for these four years, filed in 1969, were "accurate and correct in every respect" and that the liabilities set forth on each said return have been paid in full. (R. 48-50, 267; Ex. 14)

Also stipulated as evidence were four fiduciary income tax returns filed by the Fifth Third Union Trust Company of Cincinnati, reflecting as income taxable to Lachmann the same amounts that Lachmann's individual returns filed in 1969 showed as taxable income from this trust. (R. 230, 246; 234, 250; 238, 254; 242, 258).

Also stipulated as evidence were four letters from the Cincinnati bank; these were dated March 8, 1965 (pertaining to the year 1964); February 15, 1966 (pertaining to the year 1965). January 18, 1967 (pertaining to the year 1966); and January 24, 1968 (pertaining to the year 1967); these letters informed Lachmann that certain amounts (the same amounts shown on the fiduciary income tax returns filed for 1964, 1965, 1966 and 1967) "should be reported by you in your Federal Income Tax Return" for the years 1964, 1965, 1966, and 1967, respectively. (R. 262-265)

The District Court denied petitioner's motions for acquittal, both at the close of the Government's case, and on

the renewal of such motion at the close of petitioner's case. (R. 121-136; 159-173)

The Petitioner's Case

The petitioner's case consisted of putting on testimony from two character witnesses (Joseph Ventetuolo, Jr. and Lincoln S. Noble), who testified to petitioner's good reputation for honesty and integrity. (R. 137-141; 146-150)

Subsequent Proceedings

The jury found the petitioner guilty on all four counts. (R. 201, 202)

The District Court on August 7, 1972, sentenced the petitioner to three months' imprisonment on each count, sentences to run concurrently, and to pay a fine of $600 on each of the four counts. (R. 2, 226)

The petitioner filed a timely notice of appeal, under Rule 4(b), Fed. Rules of Appellate Procedure, on August 10, 1972. (R. 2, 227)

Reasons for Granting the Writ

I. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE FIRST AND THIRD CIRCUITS OVER THE MEANING OF "WILFULNESS" IN 26 U.S.C. SECTION 7203 THAT ONLY THE SUPREME COURT CAN RESOLVE.

The definition of "wilfully" in Section 7203, Internal Revenue Code of 1954 (which section, among other things, makes a federal crime of "willfully" failing to file an income tax return) is a matter of importance in the administration of the federal tax law. "A recent study, using data supplied by the IRS, estimates that there are 5,000

willful nonfiling cases per year which would be appropriate for criminal sanction." This quotation is from Vol. II, page 751, Working Papers of the National Commission on Reform of Federal Criminal Laws, established by Congress in Public Law 89-801. It is therefore essential for equal treatment of thousands of taxpayers in different parts of the country that a serious conflict in principle between Circuit Courts over the meaning of "willfully" in Section 7203 be resolved.

The position of the First Circuit in the instant case clearly conflicts with the long-established position of the Third Circuit defining misdemeanor "willfulness" in Section 7203. This conflict is peculiarly appropriate for this Court's resolution because the conflict stems from a suggestion, really dicta, in *Spies* v. *United States*, 317 U.S. 492 (1943), decided by this Court approximately thirty years ago.

The First Circuit in the instant case gave this suggestion the force of a positively unqualified statement. Thus it said:

> "We start with the case of Spies v. United States, 1943, 317 U.S. 492, where, in holding that a conviction for wilfully attempting to defeat a tax was not made out by proof of wilfully failing to file a return, the Court observed, 'mere voluntary, and purposeful, as distinguished from accidental, omission to make a timely return *might* meet the test of willfulness [without proof of an intent to defraud]' 317 U.S. 497-98. This suggestion has been adopted in a number of circuits."[2] (Emphasis supplied.)

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[2] At this point in its opinion the First Circuit cited opinions from four different courts of appeal. *United States* v. *Platt*, 435 F.2d 789 (C.A. 2, 1970); *United States* v. *Ostendorff*, 371 F.2d 729 (C.A. 4, 1967); *United States* v. *McLeod*, 436 F.2d 947 (C.A. 8, 1971); *United States* v. *Fahey*, 411 F.2d 1213 (C.A. 9, 1969).

Proceeding to the question whether the quality of the "evil motive" or "willfulness" required for the commission of this Section 7203 misdemeanor was the same quality of "willfulness" required for the commission of the felony defined by Section 7201, the First Circuit stated:

> "As did the court below, we would reject the concept that in this criminal statute negligence or oversight is to be equated with wilfulness. But we also reject defendant's claim that the conscious intent that the government must show is an intent to defraud the fisc. *Conduct chosen with that evil motive is separately provided for in section 7201 of the Code, and is made a felony. Presumptively there was a reason for section 7203. The very fact that Congress regarded violation of that section as a misdemeanor, only, at once supplies the reason and indicates that a less serious motive is addressed to.* The Supreme Court's suggestion in Spies, ante, had a valid base. We consider that the proper conclusion is drawn in those cases, cited ante, which hold that a deliberate intent to disobey the filing requirement is all that is needed." (Emphasis supplied.)

Contrary to this position of the First Circuit, the Third Circuit does not interpret Section 7203 as indicating "that a less serious motive is addressed to" in that section than in Section 7201.

In *United States* v. *Vitiello*, 363 F.2d 240 (C.A. 3, 1966), the Third Circuit stated:

> "Two cases in the Ninth Circuit, Abdul v. United States, 1958, 254 F.2d 292, and Martin v. United States, 1963, 317 F.2d 753, and the dissent in the instant case seek to justify a less restrictive definition

of 'willfulness' by arguing that the standard of willfulness is different for the misdemeanor, defined by section 7203, than for the felony — attempt to evade tax — defined by section 7201. Justification for this claimed distinction is thought to be found in the language of the Spies case in which the Court distinguished the misdemeanor from the felony, saying:

> 'The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt' as used in the felony subsection.' 317 U.S. at 498.
>
> '. . . [For the felony] Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors.' 317 U.S. at 499.

It is true that, by this language, Spies makes a distinction between the criminality of the misdemeanor and the criminality of the felony. United States v. Long, 3d Cir., 1958, 257 F.2d 340. *However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute, examples of which are given in Spies at page 499, and not in the quality of willfulness which characterizes the wrongdoing.* Thus, in Sansone v. United States, 1965, 380 U.S. 343, the defendant, indicted and tried for the section 7201 felony, claimed that he was entitled to a charge on the misdemeanor under the lesser included offense doctrine. After finding that the only issue at trial was whether the defendant's acts charged as constituting attempted tax evasion were "willful", the Court held that the defendant was not entitled to a lesser offense charge *because, as applied to the given fact situation, 'willful' in the two sec-*

> *tions 'covered precisely the same ground'.* 380 U.S. at 352." Emphasis supplied.

In summary, unlike the First Circuit in the instant case, the Third Circuit defines "wilfulness" in Section 7203 not only by considering the *Spies* opinion of thirty years age, but also by construing Section 7203 in the light of additional language in a more recent Supreme Court opinion, *Sansone* v. *United States,* 380 U.S. 343 (1965), which was not cited by the First Circuit in the instant case. This *Sansone* opinion, and the *Vitiello* opinion of the Third Circuit, indicate there is no difference in "motive" between felony "wilfulness" in Section 7201, and misdemeanor "wilfulness" in Section 7203, contrary to the position of the First Circuit.

Indeed, it appears that the Solicitor General recently has taken a position before this Court similar to that of the Third Circuit. In his petition for certiorari (No. 71-1698) in *United States* v. *Cecil J. Bishop,* 455 F.2d 612 (C.A. 9, 1972), cert. granted Oct. 10, 1972, the Solicitor General argued (page 8):

> "This court in *Sansone* therefore foreclosed the general argument, relied upon by the court below, that tax felonies require a higher degree of willfulness than tax misdemeanors."

In this same petition for certiorari the Solicitor General refers (page 10) with apparent approval to the *Vitiello* opinion.

The First Circuit cites, but minimizes, *Vitiello* on the ground that the Third Circuit in that case merely reversed a district court for allegedly charging that a finding of careless (as distinguished from deliberate) disregard of the obligation to file was sufficient to convict under Section

7203. This analysis slights the rationale furnished by *Vitiello* in criticizing the charge of the district court equating "carelessness" with "willfulness". The rationale of the Third Circuit in *Vitiello* is that misdemeanor "willfulness" in Section 7203 is the same as felony "willfulness" in Section 7201; consequently, since the felony in Section 7201 certainly could never be proved solely by evidence of "carelessness", neither could the misdemeanor in Section 7203, because both offenses require the same quality of "willfulness". This *Vitiello* rationale of the Third Circuit is thus totally at odds with that of the First Circuit in the instant case, which concludes "that a less serious motive is addressed to" in Section 7203, than in Section 7201.

Nor does this 1967 *Vitiello* opinion of the Third Circuit stand by itself. Prior to *Vitiello*, the Third Circuit in *United States* v. *Cirillo*, 251 F.2d 638 (C.A. 3, 1958) cert. denied 356 U.S. 949, had indicated that "willfulness", in this misdemeanor section, meant more than a deliberate failure to file a return, known to be due, but rather "the deliberate intention not to file a return which the defendant knew ought to be filed *so that the government would not know the extent of his liability,*" or with the "*purpose to prevent the government from getting that which it lawfully requires.*" (Emphasis supplied.)

Subsequently to *Vitiello*, the Third Circuit decided *United States* v. *Hartman*, 409 F.2d 198 (C.A. 3, 1969). There the Third Circuit characterized as "proper" the following district court charge, in a Section 7203 misdemeanor prosecution:

> "The evil motive or bad purpose in a prosecution such as this one *must* consist of proof of the deliberate intention not to file a return *so that the govern-*

> *ment would not know the extent of a taxpayer's liability.*" (Emphasis supplied.)

In *Hartman* the Third Circuit not only treated this language, given in a Section 7203 misdemeanor charge, as "proper" but also as an alternative and equivalent expression of an "intention to evade and defraud the government", the same intention, or test of "wilfulness", applicable in a Section 7201 felony prosecution. In *Hartman* (decided in 1969) the Third Circuit indicates that the language of this charge had a long history of use (at that time going back some twelve years, to 1957) in Section 7203 cases within that Circuit, for it states:

> "The propriety of this latter language was expressly approved by this court in United States v. Cirillo, 251 F.2d 630 (3 Cir. 1958) and United States v. Litman, 246 F.2d 206 (3 Cir. 1957)."

In the instant case the First Circuit minimizes *Hartman*, declaring that *Hartman* is not a "strong holding" because the Third Circuit was only approving a charge below that resulted in a conviction. This sophistic rationale[3] overlooks the fact that in the Third Circuit the standard charge in a Section 7203 misdemeanor prosecution (in effect equating "wilfulness" in Section 7203 with "wilfulness" in Section 7201) had been so long and so thoroughly established that no well-informed district court in that circuit could reasonably be expected to give a charge

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[3] After reading, and rereading, this *Hartman* opinion, petitioner's counsel also believe to be erroneous the First Circuit's statement that the *Hartman* opinion was "without specific reference to any particular portion of the instructions". Petitioner's counsel find a high degree of "specificity" in the *one* instruction there under appellate consideration, and in what the Third Circuit had to say about it.

at variance with this long-held view of the Third Circuit. This explains why Third Circuit cases generally approve, and do not criticize, district court charges on the nature of Section 7203 "wilfulness". These cases are, nonetheless, a clear indication of the interpretation long prevailing in that circuit on the meaning of "willfulness" in Section 7203, an interpretation sharply at odds with that of the First Circuit in the instant case.

The *Spies* case and the antecedent case of *United States* v. *Murdock*, 290 U.S. 389 (1933), are generally regarded as the foundation cases on the meaning of "willfulness" in federal tax crimes. What is sometimes overlooked is that *Murdock* quoted at length and relied upon an earlier holding of this Court that where willful failure to observe the directions of a revenue act was declared a misdemeanor, proof of an evil motive in addition to the deliberate act in violation of the statute was required to constitute the crime. *Felton* v. *United States*, 96 U.S. 699 (1877). Neither the First Circuit nor any of the cases cited by it in support of its view mention *Felton*, which has been cited approvingly by this Court as late as 1952 in *Morissette* v. *United States*, 342 U.S. 246 (1952). The *Felton* holding supports the rationale of the Third Circuit cases.

Unless the Supreme Court grants certiorari in this case, the First Circuit's opinion will only compound the now prevailing judicial confusion, and confusion among members of the bar, concerning what is a proper "willfulness" charge in a Section 7203 case.[4]

This increasing confusion is highlighted by the First Circuit's statement, in this case, that petitioner's counsel

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[4] See, in this connection, *United States* v. *Fahey*, 411 F.2d 1213 (C.A. 9, 1969), and article entitled "*Use of Inconsistent Standards of 'Willfulness' Under Section 7203 Creates Confusion*", appearing in the October 1972 issue of The Journal of Taxation, by Judge Samuel P. Orlando, at page 214 et seq.

themselves had "confused the issues" by requesting the following additional charge:

> "7. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by the specific evil motive is not 'willfulness' as that term is used in this case."

The First Circuit's opinion seems to proceed on the assumption that there are four "alternative" — and therefore, presumably, mutually exclusive — possible meanings of "willfulness" in Section 7203;[5] that petitioner's counsel having opted for "alternative" (3), in reliance on Third Circuit cases, had only "confused the issues" by also requesting this additional language set out above.

Petitioner's counsel did press on the District Court a "willfulness" charge reflecting alternative (3), in reliance on cases decided by the Third Circuit; but there is no inconsistency since the requested language concerning "gross negligence" not constituting "willfulness", was itself drawn from the principal Third Circuit cases that petitioner relied upon to support his alternative (3) theory. See, in this connection, *United States* v. *Vitiello*, 363 F.2d 240, (C.A. 3, 1966); and *United States* v. *Hartman*, 409 F.2d 198, footnote 1. Thus, petitioner's counsel in this case find themselves accused of "having confused the issues"

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[5] These four alternatives as described by the First Circuit are: (1) Defendant knowingly and intentionally failed to file, but did not know he was legally obligated to do so; (2) Defendant knowingly and intentionally failed to file, knowing that he was supposed to file, but not with the purpose of misleading or defrauding the government of a tax; (3) Defendant knowingly and intentionally failed to file, knowing of the obligation, and with the express purpose of misleading or defrauding the government; and (4) Defendant knew of the obligation to file, but failed to file, not by express design, but through inattention or negligence of some sort.

in separately requesting the elements of one charge consistently approved and given as one charge within the Third Circuit.[6]

II. The Opinion Below, Declaring a "Settled" Rule Which Excludes a Method for Objecting to Jury Instructions Not Prohibited by Rule 30 of the Federal Rules of Criminal Procedure, Is in Conflict with the Opinions of Other Circuit Courts, and Creates a Problem of Widespread and Continuing Importance in the Administration of Federal Criminal Justice; in this Case it Resulted in a Deprivation of Due Process.

Petitioner's Requests To Charge incorporated case citations. Thus, his requested paragraphs 6 and 7 read (R. 20 a, 20 b):

> "6. Regardless of your understanding of the meaning of the word "willful" in ordinary talk or in your everyday affairs, it has a very special meaning in this case. "Willful" or "willfully" or "willfulness" as used in this case has to do with the defendant's state of mind at the time the required returns were due to be filed. It means a failure to do an act which the law required with a bad purpose to disobey the law. It requires existence of a specific wrongful intent — an evil motive — at the time the offense is charged. *Haner* v. *United States*, (C.A. 5, 1963) 315 F.2d 792, 11 AFTR 2d 1379; *United States* v. *Vitiello*, (C.A. 3, 1966) 363 F.2d 240, 17 AFTR 2d 1255.
>
> "7. Mere laxity, careless disregard of the duty

[6] In any event this additional language, petitioner submits, was independently appropriate under *any* proper definition of "willfulness" in Section 7203 and should have been given as requested.

> imposed by law, or even gross negligence, unattended by the specific evil motive is not "willfulness" as that term is used in this case. *United States* v. *Vitiello, supra,* citing *United States* v. *Palermo,* (C.A. 3, 1958) 259 F.2d 872, 882; 2 AFTR 2d 5790; *Haner* v. *United States, supra.*"

This, then, is not a case like *Charles A. Wright, Inc.* v. *F. D. Rich Co.,* 354 F.2d 710, (C.A. 1, 1966), cert. denied 384 U.S. 960, where apparently there was a mere blanket enumeration of requests by number, some forty-five in all. In the instant case, when the district court's attention was called to the omission of petitioner's requested paragraph 7 from the charge as given, the district court necessarily had its attention directed to "the grounds of his [petitioner's] objection", namely the various cases cited in the numbered paragraph.

Moreover, the *Rich* case does not stand for the broad proposition that the First Circuit has attributed to it. It was considered and distinguished in *Petrole* v. *George A. Fetter, Inc.,* 411 F.2d 5, 8, footnote 7 (C.A. 3, 1969). Since there were some forty-five paragraphs of a requested charge involved in *Rich,* the Third Circuit considered it to be simply a case where there had been in effect only a "general" objection or exception made to the charge as given, and so refused to apply it in a case where there were thirty fewer paragraphs mentioned. In the instant case, petitioner's counsel objected to the omission of even fewer paragraphs (ten in all) than in the case of *Petrole* v. *George A. Fetter, Inc., supra.*

The statement "Defendant excepts to the failure of the court to charge defendant's requested charge number 6" has been held sufficient compliance with Rule 51 (the comparable civil practice rule) "in view of the full statement of the defendant's requested instruction number 6, which

had been presented to the Court . . .". *Lumbermen's Mutual Casualty Co.* v. *Hutchins,* 188 F.2d 214, 216 (C.A. 5, 1951). See also *Roberts* v. *United States,* 284 F.2d 209, 211 (footnote 7) (C.A.D.C., 1960).

Moreover, the reasoning of the *Rich* case rests on this language from *Palmer* v. *Hoffman,* 318 U.S. 109, 119 (1943):

> "In fairness to the trial court and to the parties, objections to charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

This language is wholly inapplicable to the instant case. Here petitioner's counsel was informed by the district court — immediately prior to charging the jury — that the district court would adopt the holding and reasoning of *United States* v. *Matosky,* 421 F.2d 410 (C.A. 7, 1970). (R. 171) The *Matosky* case does not include any reference to "gross negligence". Thus, defendant's counsel was well aware that the district court here did not intend to mention "gross negligence" as part of its charge. It would have been a time-wasting formality for petitioner's counsel to have recited again the language of his requested paragraph 7, and to again call to the Court's attention the supporting cases cited therefor, after the court had completed its charge. Cf. *Harlem Taxicab Ass'n.* v. *Nemesh,* 191 F.2d 459, 461 (C.A.D.C., 1951). Counsel was simply preserving his rights.

It thus appears that there is a conflict between the opinion below and opinions of other Circuit Courts and that there is no "settled" rule as declared by the First

Circuit in this case to the effect that objection to an instruction may not be taken by reference to paragraphs in written requests to charge notwithstanding the fact that such written requests set out adequate grounds.

Rule 30 of the Rules of Criminal Procedure for the United States District Courts simply requires that a party must make his objections to any portion of the court's instruction before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. No special way to accomplish this is required. It should not be interpreted "woodenly". *United States* v. *Currens,* 290 F.2d 751, 758-761 (C.A. 3, 1961). Moreover, Rule 30 must be interpreted in the light of Rule 2 which provides:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

In this case petitioner made his objections to the trial court's jury instruction on the basis of his reading and understanding of Rule 30 which does not require or prohibit any particular method for making objections. Neither the trial court nor opposing counsel expressed any difficulty in understanding petitioner's objections.[7] For the Circuit Court to reject petitioner's method on the basis of a presumed "settled" rule has the effect of changing the rules of the proceeding after the proceeding has ended.

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[7] In fact, petitioner's counsel requested the trial court's permission to make objections by reference to the numbered paragraphs in the Requests To Charge, and the trial court indicated no objection to this method. (R. 197)

This is a violation of procedural due process as required by the Fifth Amendment to the Constitution.

It is a matter of great importance in the administration of criminal justice that there be no confusion as to how to go about the every day function of making objections to instructions to a jury. The Circuit Court's declaration that there is a "settled" rule that such objections cannot be made by reference to numbered paragraphs of written requests (even with supporting authority set out in such paragraphs), which rule is not supported by the cases generally, requires clarification by this Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1286

UNITED STATES OF AMERICA,

APPELLEE,

v.

NORBERT K. LACHMANN,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before
ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

James R. McGowan, with whom *Lester H. Salter* was on brief, for appellant.

Joseph C. Johnston, Jr., Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on brief, for appellee.

November 29, 1972

ALDRICH, *Senior Judge.* Defendant was found guilty by a jury of "willfully" failing to file timely income tax returns for the years 1964-67. 26 U.S.C. § 7203. The receipt of sufficient gross income to impose the obligation, and the failure to file in each of those years were conceded. The principal question on this appeal is whether the government's burden as to willfulness is as the court charged, or is the heavier one for which he contends. Defendant has so confused the issues that a detailed opinion is called for.

In theory there are at least four alternative meanings of "willfully" as used in this statute. (1) Defendant know-

ingly and intentionally failed to file, but did not know he was legally obligated to do so. (2) Defendant knowingly and intentionally failed to file, knowing that he was supposed to file, but not with the purpose of misleading or defrauding the government of a tax. (3) Defendant knowingly and intentionally failed to file, knowing of the obligation, and with the express purpose of misleading or defrauding the government. (4) Defendant knew of the obligation to file, but failed to file, not by express design, but through inattention or negligence of some sort. The court adopted alternative (2),[1] whereas defendant sought alternative (3). In spite of careful reading of his brief, only during oral argument did we learn that defendant has a still further complaint.

In oral argument defendant advanced the claim that the court's quoted charge permitted the jury to convict if it found that his failure to file had been due to gross negligence. Asked where he made such a complaint to the district court, counsel pointed to the transcript where the following appears at the end of an extensive post-charge colloquy at the bench.

"[T]he defendant particularly objects to the failure

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[1] The court charged,

"'Willfully' as used in this law means that the defendant acted voluntarily, purposefully, deliberately, and intentionally in failing to file his return — that is, *at the time for filing in failing to do so he had a deliberate intention not to file the return which he knew ought to have been filed.*

"This conduct, ladies and gentlemen, must be distinguished from inadvertently, negligently or mistakenly failing to file.

"If you find the defendant in failing to file acted inadvertently, acted negligently or mistakenly then, of course, your verdict must be not guilty. On the other hand, if you find the defendant acted voluntarily, purposefully, deliberately and intentionally in failing to file his returns, then of course if you also find the Government has proven beyond a reasonable doubt the other elements I instructed you on, your verdict must be guilty — and the other elements that have been agreed to. So willfulness is the issue for you to decide." (Emphasis supplied.)

> to charge the language of bad purpose, to disobey the law, and the defendant also objects to the failure to charge the substance of paragraphs 7, 8, and 9, alternative 9 which is contained in the supplemental request for charge, 10, 11, 12, 17, 18, and that part of paragraph 20 having to do with the proposition that evidence of good character standing alone may be sufficient in and of itself to create a reasonable doubt of guilt. Thank you, Your Honor."

Request No. 7 read as follows.

> "7. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by the specific evil motive is not 'willfulness' as that term is used in this case."

However, the colloquy as a whole shows that defendant's articulated objections were not as to negligence versus gross negligence, but were to the court's adopting alternative (2), ante, rather than (3), for which defendant contended. It is true that by the time of the charge the court had heard counsel's argument[2] that defendant may have believed it was sufficient protection for the government to have the information returns filed by defendant's payors, but this was not enough to put the court on notice that it should explain to the jury that there is a difference between negligence and gross negligence and then instruct it to exclude both.

It is clear under settled decisions that mere blanket enumeration of requests by number is, prima facie, not enough. *Charles A. Wright, Inc.* v. *F. D. Rich Co.*, 1 Cir., 1966, 354 F.2d 710, *cert. denied* 384 U.S. 960. Fairness, the candor which counsel owes to the court, and the duty to avoid unnecessary new trials, desirable as that possibility may appear to a defendant as an anchor to wind-

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[2] Defendant did not testify.

ward, requires more. See discussion in *Dunn* v. *St. Louis, San Francisco Ry. Co.*, 10 Cir., 1966, 370 F.2d 681. The court in the case at bar, with its attention focussed on the debated application of alternative principle (3) as against (2), might only too naturally believe that what it said to exclude negligence or mistake was enough. Indeed, for defendant now to ask for the added distinction, if not pure afterthought, seems a classic example of a violation of the rule expressed in *Wright* v. *Rich*, ante, and its purpose.

We have devoted this amount of attention to what would otherwise be routine because of the circumstance that defendant's brief relies on cases dealing with carelessness, alternative (4), although he is plainly arguing the merits of alternative (3), hereinafter referred to as defendant's charge, as against (2). His basic thrust is the assertion that there is a "sharp split" in the circuits. In point of fact, such split as exists is almost exclusively over the correctness of alternative (4), an alternative which, except for defendant's technical point we have just discussed, the court below expressly instructed the jury to reject.

We start with the case of *Spies* v. *United States*, 1943, 317 U.S. 492, where, in holding that a conviction for willfully attempting to defeat a tax was not made out by proof of willfully failing to file a return, the Court observed, "mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness [without proof of an intent to defraud]." 317 U.S. 497-98. This suggestion has been adopted in a number of circuits. *United States* v. *Platt*, 2 Cir., 1970, 435 F.2d 789; *United States* v. *Ostendorff*, 4 Cir., 1967, 371 F.2d 729, *cert. denied* 386 U.S. 982; *United States* v. *MacLeod*, 8 Cir., 1971, 436 F.2d 947, *cert. denied* 402 U.S. 907; *United States* v. *Fahey*, 9 Cir., 1969, 411 F.2d 1213, *cert. denied* 396 U.S. 957. Defendant cites three cases from the Third Circuit, and two from the Fifth which,

he says, are to the contrary. They do not, however, afford him that comfort. It is true that in *United States* v. *Hartman*, 3 Cir., 1969, 409 F.2d 198, the court spoke with approval of an extensive charge which included what we have called defendant's charge. This it did in affirming a conviction, and without specific reference to any particular portion of the instructions. Such general endorsement, if a holding, is certainly not a strong holding that a reversal would have been required had some individual part been omitted. Even more remotely supportive of the defendant are his cases of *United States* v. *Litman*, 3 Cir., 1957, 246 F.2d 206, and *Hargrove* v. *United States*, 5 Cir., 1933, 67 F.2d 820. His two remaining citations, *United States* v. *Vitiello*, 3 Cir., 1966, 363 F.2d 240, and *Haner* v. *United States*, 5 Cir., 1963, 315 F.2d 792, do not touch defendant's charge even indirectly. Rather, they reverse the district court for instructing that a finding of careless, as distinguished from deliberate, disregard was sufficient to convict. Without doubt there is a sharp split on that issue, see defendant's cases of *Abdul* v. *United States*, 9 Cir., 1958, 254 F.2d 292, and *United States* v. *Bishop*, 9 Cir., 1972, 455 F.2d 612, *cert. granted* 10/10/72, but that is irrelevant to the question before us. In point of fact, defendant has cited no court of appeals decision that has even criticized, let alone reversed, a district court for failure to give his requested charge.

As did the court below, we would reject the concept that in this criminal statute negligence or oversight is to be equated with willfulness. But we also reject defendant's claim that the conscious intent that the government must show is an intent to defraud the fisc. Conduct chosen with that evil motive is separately provided for in section 7201 of the Code, and is made a felony. Presumptively there was a reason for section 7203. The very fact that Congress regarded violation of that section as a misdemeanor, only,

at once supplies the reason and indicates that a less serious motive is addressed to. The Supreme Court's suggestion in *Spies,* ante, had a valid base. We consider that the proper conclusion is drawn in those cases, cited ante, which hold that a deliberate intent to disobey the filing requirement is all that is needed. Manifestly the government's income tax structure is predicated, generally, on the filing of returns. To hold that every non-complier must go free unless the government establishes an affirmative intent to deprive the government of a tax known to be due would seriously interfere with its operation. We are not surprised that the advertised sharp split in the cases is not to be found.

Defendant's remaining points may be readily disposed of. The court's instruction with regard to character evidence[3] while doubtless not as helpful to defendant as he might have liked, seems to us quite sufficient. See the discussion in *Mannix* v. *United States,* 4 Cir., 1944, 140 F.2d 250, 253-54. *See also United States* v. *Ramzy,* 5 Cir., 1971, 446 F.2d 1184, *cert. denied,* 404 U.S. 992; *United States* v.

[3] "Now let's talk about one other thing, reputation. There was certain testimony that was introduced in this case on behalf of the defendant as to his previous reputation for honesty. Now, such evidence may be properly presented by the defendant charged with the commission of an offense in order to show that his character is such that in all likelihood he is not the type of person who would commit the offense or offenses with which he is charged. I instruct you that you should consider this evidence and give it such weight as you believe it deserves. This evidence concerning the defendant's reputation for honesty should be considered by you, together with all the other evidence in this case, in determining the guilt or innocence of the defendant. If, when considered with all the other evidence presented during this trial, it creates a reasonable doubt in your mind as to the guilt of the defendant, you should find him not guilty. But I must caution you that the circumstance that an individual has borne a previous good reputation for honesty is not to be used as a reason for showing leniency to one whose guilt, after an honest, careful and intelligent consideration of all the evidence, including such evidence as to a good reputation for honesty, has been established by proof beyond a reasonable doubt."

Fayette, 2 Cir., 1968, 388 F.2d 728, 737; *Carbo* v. *United States,* 9 Cir., 1963, 314 F.2d 718, 746-47, *cert. denied* 377 U.S. 953; *Poliafico* v. *United States,* 6 Cir., 1956, 237 F.2d 97, 114, *cert. denied* 352 U.S. 1025. To the extent that the opinion in appellant's case of *Oertle* v. *United States,* 10 Cir., 1966, 370 F.2d 719, *cert. denied* 387 U.S. 943, may go further, we decline to follow it. So, too, was defendant's request with respect to conflicting inferences adequately given. The court does not have to repeat its charge about burden of proof in every breath. It is hornbook law that precise language of a request, even though accurate, does not have to be adopted. Defendant's contention that the evidence was insufficient to convict would appear to us frivolous even if the government's burden were as defendant contends. Nor is this statute unconstitutional for vagueness.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 72-1286

UNITED STATES OF AMERICA,
APPELLEE,

v.

NORBERT K. LACHMANN,
DEFENDANT, APPELLANT.

JUDGMENT

Entered November 29, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) DANA H. GALLUP
Clerk

[cc: Messrs. McGowan and Johnston.]